



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

PLEADING—DEMURRER—WAIVER OF.—A salesman employed in a wholesale and retail store of a manufacturer makes retail sales to himself at a lower price than that authorized by his employer, under the false pretense that the sales were made to a wholesale agent of his employer. In an action by the employer against the salesman for wrongfully making the sales to himself, the defendant answered by general denial. The case was referred to an auditor, who heard the evidence offered by both parties and made a report. At the trial in the superior court, after the pleadings were read, defendant asked the court to rule that the counts of the declaration did not set out a cause of action against the defendant or assign any breach by him of any contract. *Held*, that defendant waived the objection, and, if facts have been proved sufficient to establish a cause of action, it is too late for him to ask for such a ruling at the trial. *George N. Pierce Co. v. Beers* (1906), 190 Mass. 199.

The decision in this case, while supported by several good authorities, is undoubtedly at variance with the great majority of recent decisions upon this point. The question is, when there are sufficient grounds for demurrer, does the party, by not demurring before going to trial, waive his right to raise the objection? The general rule is well settled, but the conflict comes in its application. Some of the best courts hold, that, although the pleading is in fact defective, and even though it was so defective as to be demurrable, yet as the adverse party had not demurred or moved to make it more certain, but had gone to trial upon it, he had thereby waived all objections to its sufficiency. In *White v. Spencer*, 14 N. Y. 247, DENIO, J., said: "Although the plaintiff might have successfully demurred to the answer, because an averment of adverse user was omitted, I am of the opinion that the plaintiff having treated the allegations in the answer as a sufficient statement of defence in replying to it, and by going to trial without objection, is precluded from objecting to evidence to sustain it." This doctrine is supported by *Treadway v. Wilder*, 8 Nev. 91; *Meyer v. McLean*, 1 Johns. 509; *Reynolds v. Lounsbury*, 6 Hill, 534; *Roback v. Powell*, 36 Ind. 515; POMEROY, in his *CODE REMEDIES*, 4 Ed., p. 604, says, "The doctrine, as stated in *White v. Spencer*, supra, is clearly erroneous, and the dicta or decisions which sustain it ought to be wholly disregarded; it violates the section of the codes which enacts that the absence of sufficient facts as a ground of demurrer is not abandoned by an omission to demur; and it utterly ignores the established distinction between a failure to state any cause of action and a statement of a cause of action in an imperfect and defective manner. It is only when the answer itself, by some of its averments, supplies the omission in a complaint or petition otherwise demurrable, that the fault is cured and the objection waived by answering; mere answering instead of demurring cannot produce that effect." *Garner v. McCullough*, 48 Mo. 318; *Scofield v. Whitelegge*, 49 N. Y. 259; *Saulsbury v. Alexander*, 50 Mo. 142; *Bate v. Graham*, 11 N. Y. 237; *Louisville & P. Canal Co. v. Murphy*, 9 Bush, 522; *Manning v. Tyler*, 21 N. Y. 567; *Lefler v. Field*, 52 N. Y. 621; *Gaston v. McLeran*, 3 Oreg. 389; *Taggart v. Risley*, 3 Oreg. 306; *Freitag v. Burke*, 45 Ind. 38. The rule laid down by

Mr. Pomeroy, with its proper limitations, operates in the interests of justice and good faith. To give the rule the broad meaning attempted by some courts would tend to destroy all accuracy and certainty in pleading.

PUBLIC OFFICERS—RIGHT TO COMPENSATION AS BETWEEN DE JURE AND DE FACTO OFFICERS.—In an action by a state officer against the state auditor, for salary for a portion of his term of office for which he was appointed, and for which he had duly qualified, though during such portion of the term he had not personally assumed charge of the office, and compensation for such time had been paid to the *de facto* incumbent. *Held*, the *de jure* officer was entitled to recover. *Tanner v. Edwards* (1906), — Utah —, 86 Pac. Rep. 765.

The question in the principal case was, could the disbursing officer refuse to issue a warrant when the claimant had the proper credentials from the appointing power and had duly qualified? This is a much disputed point. The defendant claimed that not only must the public officer be appointed and qualified, but must also take charge of, assume the duties of, and perform the services in, the office, even though wrongfully hindered from occupying the position, because the salary is the reward for expressed services. While this is a rather broad statement, yet it is almost in line with the weight of authority, which is that if no judgment of ouster has been rendered against the officer *de facto*, and during the incumbency of such office, the city or county of which he is such officer has paid him the salary of such office, the right of the officer *de jure* to collect his salary from such city or county is lost. *Auditors Wayne County v. Benoit*, 20 Mich. 176 (1870); *State v. Clark*, 52 Mo. 508 (1873); *Steubenville v. Culp*, 38 Oh. St. 23 (1882); *Smith v. Mayor of New York*, 37 N. Y. 518; *Westerby v. City of Kansas City*, 64 Mo. 493; *McVeany v. Mayor*, 80 N. Y. 185; see *McVeany v. Mayor* (1 Hun 35), reversing (80 N. Y. 185) and so in line with the proposition under which it is cited; *Dolan v. Mayor*, 68 N. Y. 274 (1877). It has been so held even where it was known that the officer *de facto* was insolvent, and that his title to the office was being contested by the officer *de jure*. *Commissioners of Saline County v. Anderson*, 20 Kans. 298. The basis of these decisions is partly that there is no property right in the office, and partly because the right to the salary depends upon the actual performance of the services, that while the officer *de facto* is in possession of the office, his right to the same can be questioned only by a proceeding in quo warranto. If, then, the state has a right to pay the officer *de facto* while acting, it is self-evident that the officer *de jure* can not compel it to pay again, and payment is a good defense. But the *de jure* officer in any appropriate form of action may compel the officer *de facto* to account to him for the salary which has been received by him. *Douglas v. State*, 31 Ind. 429 (1869); *Mayfield v. Moore*, 53 Ill. 428; *Auditors Wayne County v. Benoit*, 20 Mich. 176; *Rull v. Tait*, 38 Kans. 765 (1888); *Bier v. Gowell*, 30 W. Va. 95 (1887); *People v. Miller*, 24 Mich. 458; *Hunter v. Chandler*, 45 Mo. 452 (1870); *State v. Tate*, 74 N. C. 131. If judgment of ouster has been rendered, the officer *de jure* may maintain an action against the city or county notwithstanding payment. *McVeany v. Mayor of New York*, *supra*; or if no part has been paid, the officer *de facto*, *Dolan v. The Mayor*, *supra*. *Comstock v. Grand Rapids*, 40 Mich. 397. In *Selby v.*